

LETTER OPINION
99-L-38

May 19, 1999

Mr. Russell L. Hanson
Executive Director
Agricultural Products Utilization Commission
1833 East Bismarck Expressway
Bismarck, ND 58504-6708

Dear Mr. Hanson:

Thank you for asking whether a conflict of interest exists when the chairman of the Agricultural Products Utilization Commission (APUC) is named as a director in a corporation receiving past and potential future grants by APUC. You ask, in effect, whether such involvement creates a conflict of interest under APUC's rules or policies, or state statutes. Further, you ask whether APUC may serve in an advisory capacity to a nonprofit corporation.

APUC was created by N.D.C.C. ch. 4-14.1, and consists of nine members. APUC awards grants and administers grant programs in furtherance of the purpose of ch. 4-14.1, which is:

to provide necessary assistance to the research and marketing needs of the state by developing new uses for agricultural products, byproducts, and by seeking more efficient systems for processing and marketing agricultural products and byproducts, and to promote efforts to increase productivity and provide added value to agricultural products and stimulate and foster agricultural diversification and encourage processing innovations.

N.D.C.C. § 4-14.1-01. A grant awarded by APUC is implemented through a grant contract, which governs the terms, conditions, and administration of the grant. The grant contract requires the grantee to follow certain procedures and requirements, and perform certain actions, and in return, APUC pays the grantee as outlined in the contract.

Dakota Beef Development Corporation (DBDC), a nonprofit corporation, was formed as a result of the dissolution of Northern Plains Premium Beef (NPPB). APUC previously awarded two grants to NPPB totaling approximately \$197,000. One of the stated purposes of DBDC is to "assist livestock producers in organizing and developing a vertically

integrated beef processing company." See Articles of Incorporation of Dakota Beef Development Corporation. In doing so, DBDC may also "apply for grant funds and . . . provide financial assistance as necessary to accomplish its purposes." Id. DBDC has named Kevin Pifer as one of its eight corporate directors. The corporate directors are not paid for their services. Id. Mr. Pifer currently serves as APUC's chairman.

Information from four different sources is relevant in determining whether conflicts of interest exist for APUC members¹: First, APUC's own administrative rule; second, APUC's conflict of interest policy; third, N.D.C.C. § 12.1-13-02; and fourth, N.D.C.C. § 12.1-13-03.

APUC's administrative rule provides, "By law, no member of [APUC] may participate in, or vote on, a decision of [APUC] relating to an organization in which that individual has a direct personal financial interest." N.D. Admin. Code § 95-02-04-01(4) (emphasis added).²

APUC's conflict of interest policy provides, in part:

II. DEFINITIONS

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- (7) The term "Financial Interest" means any actual or potential financial, professional or personal interest, including job offers or other employment opportunities.

¹ The DBDC should keep in mind laws that may apply to it regarding conflicts of interest. See N.D.C.C. §§ 10-33-27(2), (3); 10-33-45(4); and 10-33-46.

² This rule applies to the awarding of APUC's research and marketing grants, cooperative marketing grants, and farm diversification grants. See N.D. Admin. Code §§ 95-02-04-01(4), 95-03-01-02, and 95-04-01-02.

For discussion of the meaning of the terms, "direct", "personal", and "financial" in a conflict of interest context, see State v. Robinson, 2 N.W. 2d 183 (N.D. 1942), Thompson v. Lone Tree Township, 52 N.W. 2d 840 (N.D. 1952), State v. Pyle, 71 N.W. 2d 342 (N.D. 1955), 1995 N.D. Op. Att'y Gen. 21, 1996 N.D. Op. Att'y Gen. L-174 (Oct. 3 letter to Kevin Pifer), 1996 N.D. Op. Att'y Gen. L-235 (Dec. 13 letter to Thomas Traynor), 1997 N.D. Op. Att'y Gen. L-71 (June 18 letter to William Binek).

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III. GENERAL PROVISIONS

Commission members and Commission employees should avoid any action which would result in:

- (1) Using public office for private gain;
- (2) Giving preferential treatment to any Business or Person;
- (3) Losing independence or impartiality;
- (4) A Commission decision being made outside official channels;
- (5) Affecting adversely the confidence of the general public in the integrity of the Commission, or the grant program authorized by N.D.C.C. ch. 4-14.1.

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V. FINANCIAL INTERESTS

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A conflict of interest may develop for a Commission member as a result of evaluating applications for grants funded by the Commission. A conflict of interest exists for a Commission member if he or she has a substantial financial interest in a business which has submitted an application for a grant from the Commission. To address potential conflicts of interest, the Commission adopts the following procedures:

- (1) A Commission member or employee shall disclose any financial interests held by the member, employee, family member or immediate family member, in a business or person which has submitted a grant application or, to the best of the member or employee's knowledge, is considering submitting a grant application to the Commission.
- (2) If a Commission member or employee has a financial interest in a business or person of 50% or more, that business or person will be deemed ineligible to receive grant funds from the Commission.

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- (3) If a Commission member or employee has a financial interest in a business or person of less than 50%, following disclosure of the interest, and consideration of other factors determined by the

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Commission, the Commission will determine, by majority vote, whether the business or person will be deemed ineligible to receive grant funds from the Commission.

. . . .

North Dakota Agricultural Products Utilization Commission Conflict of Interest Policy (emphasis added). Thus, APUC's conflict of interest policy provides that a conflict of interest exists if a member of APUC has a "substantial financial interest" in a grant applicant. A "financial interest" is defined in APUC's conflict of interest policy to mean "any actual or potential financial, professional or personal interest, including job offers or other employment opportunities." APUC's conflict of interest policy also includes general provisions stating APUC members should avoid any action that would have certain listed results.

Contracts between APUC and a grantee are also governed by N.D.C.C. § 12.1-13-02, which makes it a class A misdemeanor for a public servant to take official action likely to benefit that public servant as a result of an acquisition of a "pecuniary interest" in any transaction or enterprise, or in aiding another in acquiring such interest. For the meaning of "pecuniary" interest, see 1995 N.D. Op. Att'y Gen. 21, 1996 N.D. Op. Att'y Gen. L-235 (Dec. 13 letter to Thomas Traynor), 1997 N.D. Op. Att'y Gen. L-71 (June 18 letter to William Binek). Whether a person has a pecuniary interest prohibited by N.D.C.C. § 12.1-13-02 may be analyzed as indicated in 1993 N.D. Op. Att'y Gen. L-204 (June 25 letter to Deborah Fohr Levchak).

Contracts between APUC and a grantee are also governed by N.D.C.C. § 12.1-13-03 which makes it a class A misdemeanor for a public servant to be "interested individually . . . directly or indirectly" in a contract made in an official capacity, alone or in conjunction with other public servants. The individual interest prohibited by N.D.C.C. § 12.1-13-03 refers to either a financial or a proprietary (in other words, ownership) interest. 1995 N.D. Op. Att'y Gen. 21, 27-28.

To summarize, the APUC rule and N.D.C.C. § 12.1-13-02 relate to, or prohibit, some kind of financial (in other words, pecuniary) interest. N.D.C.C. § 12.1-13-03 prohibits a financial or a proprietary (in other words, ownership) interest. APUC's conflict of interest policy addresses the broadest interest, i.e., a "substantial actual or potential financial, professional or personal interest,"

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and includes general provisions stating APUC members should avoid actions that would have certain listed results.

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Upon considering the four different sources regarding conflicts of interest relevant to APUC, it is my opinion that past or potential future receipt of grants from APUC do not, by themselves, create a conflict of interest under APUC's rule or conflict of interest policy, or N.D.C.C. §§ 12.1-13-02 or 12.1-13-03.

By simply being an unpaid director of DBDC, Mr. Pifer does not have a financial interest, nor does he have a proprietary interest, in DBDC. Therefore, it is my opinion that Mr. Pifer's serving as both an unpaid director of DBDC and APUC's chairman, does not, by itself, create a conflict of interest under APUC's administrative rule or N.D.C.C. §§ 12.1-13-02 or 12.1-13-03.

In my opinion, Mr. Pifer's serving as both an unpaid director of DBDC and APUC's chairman does not, by itself, result in a "substantial" actual or potential financial, professional or personal interest, as addressed in APUC's conflict of interest policy. In a similar context, our office determined the meaning of "substantial":

Substantial means "[o]f real worth and importance; of considerable value; . . . something worthwhile as distinguished from something without value or merely nominal." Id. at 1428, citing Seglem v. Skelly Oil Co., 65 P.2d 553, 554 (Kan. 1937); see also Miller v. Commissioner of Internal Revenue, 84 F.2d 415, 418 (6th Cir. 1936) ("In the commonly accepted legal sense, a substantial interest is something more than a merely nominal interest"); Yetman v. Naumann, 492 P.2d 1252, 1255 (Ariz. Ct. Ap. 1972) ("substantial interest" defined in statute as any interest other than a "remote interest").

1995 N.D. Op. Att'y Gen. 21, 25. Thus, a "substantial" interest is one that is not nominal or remote, but is important, of considerable value, or real worth. Mr. Pifer is an unpaid director of DBDC. That fact, by itself, does not rise to the level of a "substantial" financial, professional, or personal interest.

As indicated earlier in this opinion, APUC's conflict of interest policy also includes a "General Provisions" section, which states, "Commission members . . . should avoid any action which would result in:

- (1) Using public office for private gain;
- (2) Giving preferential treatment to any Business or Person;
- (3) Losing independence or impartiality;

- (4) A Commission decision being made outside official channels;
- (5) Affecting adversely the confidence of the general public in the integrity of the Commission, or the grant program authorized by N.D.C.C. ch. 4-14.1.

APUC members should keep in mind these general provisions. If it appears to an APUC member that any of the above-listed results will occur in a particular factual situation, the APUC member should avoid the action at issue. Certain of the results listed above may occur as the result of a conflict between the fiduciary relationships Mr. Pifer has with both APUC and DBDC.

An officer or director of a corporation owes a fiduciary duty to the corporation and its stockholders. Production Credit Ass'n of Fargo v. Ista, 451 N.W.2d 118, 121, citing 3 Fletcher, Corporations Secs. 838, 848 (1986). "[A]s a fiduciary in this sense, a director's first duty is to act in all things of trust wholly for the benefit of the corporation." Id. citing 3 Fletcher, Corporations, supra, Sec. 838 at 178. See also N.D.C.C. § 10-33-45, (a director shall act "in a manner the director reasonably believes to be in the best interests of the corporation"). Consequently, Mr. Pifer is compelled to act in the best interest of DBDC with respect to its application for grant money.

A public officer also occupies a fiduciary relationship to the political entity on whose behalf the officer serves. 63A Am. Jur. 2d Public Officers and Employees, § 319 (1984). A public officer is not permitted to place himself in a position which will subject him to conflicting duties or expose him to the temptation of acting in any manner other than in the best interest of the public, and a public official may not use his official power to further his own interest. Id. at § 321.

Whether Mr. Pifer's involvement with any forthcoming grant application from DBDC is impermissible is a factual question which I cannot resolve. APUC is in the best position to determine the meaning of its own conflict of interest policy, and to evaluate the facts to determine whether the policy is violated. APUC must also serve as the fact-finder and decision-maker in the exercise of its statutory authority. In exercising its authority, APUC should look to this opinion and its citations as a guide in determining whether Mr. Pifer has a conflict of interest under APUC's rule or conflict of interest policy, or N.D.C.C. §§ 12.1-13-02 or 12.1-13-03.

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You also ask whether APUC could serve in an advisory role to DBDC. State agencies are creatures of statute, and as such have only such authority or powers as are granted to them or necessarily implied from the grant. First Bank of Buffalo v. Conrad, 350 N.W.2d 580, 584-585 (N.D. 1984). While there is no statute that directly authorizes such an advisory role, such authority may be necessarily implied from N.D.C.C. § 4-14.1-03.1. That section authorizes APUC to expend any "service made available from public or private sources consistent with the purpose of" chapter 4-14.1. Id. If APUC has access to "public or private sources" capable of providing advisory services to grant applicants, such would appear to be within the purview of the statute.

Sincerely,

Heidi Heitkamp
Attorney General

PCG/LAS/vjk